United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1132

To be argued by
MURRAY RICHMAN

B/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

RENATO CROCE,

Appellant,

and

VIRGIL ALESSI, ANTHONY PASSERO, JOHN D'AMATO, LAWRENCE IAROSSI, a/k/a "Big Lou", JAMES PANEBIANCO, a/k/a "Jimmy Feets", GRAZIANO RIZZO, a/k/a "Ju-Ju", LEONARD RIZZO, a/k/a "Lennie", JOSEPH BARONE, a/k/a "Frankie", FIORE RIZZO, PATSY ANATALA, a/k/a "Bock", SNIDER BLANCHARD, a/k/a "[illegible]ap", WILLIAM HUFF and CHARLES BROOKS,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Whether the evidence was insufficient as a matter of law to convict the Appellant of the crime of conspiracy.

2. Whether the evidence adduced at trial failed to establish a single conspiracy, but rather offered proof of multiple conspirac ies some of which were totally unrelated to the Appellant which was prejudicial and denied the Appellant a fair trial.

3. Whether the Court erred in denying the Appellant's motion for a severance pursuant to Rules 8(b) and 14 of the Federal Rules of Criminal Procedure.

4. Whether the trial court's denial of the Appellant's motion pursuant to Rules 12, 41 (e) and (f) to suppress evidence seized in violation of the Appellant's constitutional rights deprived the Appellant of a fair trial.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X
Docket No. 76-1132
----------X

UNITED STATES OF AMERICA,

Appellee,

- against -

RENATO CROCE,

Appellant.
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On Appeal From The United States
District Court For The Southern
District of New York
----------X

BRIEF FOR THE APPELLANT

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal, Presiding) rendered on March 24, 1976, wherein the Appellant, Renato Croce, was convicted after a trial by jury of conspiracy to violate Sections 812, 841(a)(1) and 841(b)(1)(A) and two substantive counts of distribution.

The Appellant was sentenced to the care and custody of the Attorney General for a period of ten years with a special parole term of six years to commence upon the expiration of the term of imprisonment.

The Trial Court has permitted the Appellant to be released on bail pending the determination of this appeal.

STATEMENT OF FACTS

A twenty-three count indictment was filed charging the Appellant, Renato Croce, in Count I of conspiracy to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code, to unlawfully, intentionally and knowingly distribute and with intent to distribute Schedule I and II narcotic drug controlled substances. The Appellant was further charged in Counts 22 and 23 with having distributed a Schedule I controlled substance, to wit, approximately 242 grams and one-half kilogram of heroin, respectively.

The indictment alleged that from January 1, 1968 , up to and including June, 1973, that the Appellant, in conjunction with other named defendants and co-conspirators, conspired to facilitate the distribution and possession with intent to distribute Schedule I and Schedule II narcotic drug controlled substances.

THE TRIAL

THE PROSECUTION CASE

MARY MOBLEY testified that she was age 24 and lived in Pittsburgh, Pennsylvania. (28) She had been convicted for possession of heroin and marijuana in 1971 and received a one-year probation sentence. She also received a three-year probation sentence on a burglary charge. Additionally, she was sentenced to ten days in jail with nine months suspended plus three years probation for forgery in the State of California. (32)

She testified that she still had three outstanding charges pending against her, two for forgery and one for armed robbery. (33)

Mobley testified that in August, 1968, she met Alvin Clark

who gave her some money and flew to New York with her. (36) They returned to Pittsburghthe same evening. At the airport, Clark gave her a package which she placed in her purse. In the bathroom on the plane she opened the package and tasted part of its contents and she knew it was heroin. (37)

Prior to this incident,she testified, she had been using drugs for six years. She took an ounce out of the package which she asserted contained one-eighth of a kilo. (38)

She testitifed that she made many subsequent trips to Kennedy and Newark airports to pick up narcotics. (41) Mobley testified that she came to New York with Alvin Clark at least ten time to pick up packages beginning in 1968. (47-48) Mobley stated that she met Big Lou* at a Holiday Inn at Laguardia Airport. (51) Mobley testified that she received packages containing between one-eighth of a kilo up to one kilo. (53)

Mobley testified that Clark gave her money when she went to New York alone and that she kept half of the money for herself. (54) Mobley stated that she was supposed to pay out all of the money. (54) Occasionally the persons in New York would question the amount of money, but Mobley would tell them that Clark would send the rest. (55)

In the winter of 1968, Big Lou introduced Mobley to Ralphie.** Mobley stated that she returned to New York every two to three weeks depending upon how fast Clark sold the packages she received. (58)

Numbers refer to transcript page numbers
* Big Lous later identified as Lawrence Iarossi.
** Ralphie later identified as Joseph Manfredonia.

Mobley testified that she employed various aliases including Vibins, Wilson and Scott. She also stated that she would take an ounce or so out of each of the packages and cut it up to 16 times and sell it. (61)

In the summer of 1970, Mobley testified, she met Gu Gu * in Pittsburg at the grand opening of the Dog & Burger hot dog shop. (64) Subsequently, Mobley met Gu Gu when she came to New York and he delivered packages to her. (66) She picked up packages from Gu Gu from the summer of 1970 until the summer of 1971. (68) In August, 1971, [redacted] went to jail and did not pick up any more packages for Clark.

Mobley testified that about two weeks after she met Gu Gu, she was introduced to Lennie ** by Alvin Clark. This occurred at the Dog & Burger. (70) Mobley stated that she had a three hour argument with Lennie which Mobley asserted Lennie started by saying about her " who is that bitch" before they were even introduced. (70)

An identification was conducted outside the hearing of the jury. At the hearing, Mobley stated that she became a co-operating witness with the Government in 1974. (72)

Mobley stated that she came to the United States Attorney's Office several times and was shown 25 to 30 photographs. (75) She picked out Big Lou, Ji-Ji***, Frankie ****, Ralphie, Gu Gu and Rene.***** (79-81)

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* Gu Gu later identified as Graziano Rizzo. He plead guilty and did not stand trial.
** Lennie later identified as Leonard Rizzo.
*** Ji-Ji later identified as Louis Inglese was not charged in this indictment.
**** Frankie later identified as James Barone.
***** Rene later identified as Renato Croce, the Appellant.

Mobley asserted that she met Lennie about 10 to 15 times or more. On one occasion Lennie allegedly offered her $1,000. to go to a hotel with him but she refused. (87) Mobley stated that she met Lennie from the summer of 1970 until August, 1971. (87) She also claimed to have met with Big Lou from 1968 until 1970. (88) She met with Ralphie about 20 times. She met with Frankie ten times. Mobley stated that she met with Rene on one occasion. (88) She made an in-court identification of Croce after some difficulty. (89-90) She indicated that she thought the defendant Panebianco was named Rene, but that he was not the person she knew as Rene. (92)

ARTHUR CARTER, employed by the Drug Enforcement Administration (DEA), testified at the hearing regarding the photo identifications made by Mobley. (147) He stated that she picked out Frankie, Ji-Ji, Gu Gu and Rene at the U.S. Attorney's Office. (149)

Carter stated that Croce was not under investigation in 1974 when he first met Mobley. (169) Mobley did not describe Rene when she first met Carter. (169) Subsequently, Carter asserted that he learned from Mobley that a person named Rene was involved and he included Croce's picture in the array. (170) Rene had not been described by Mobley during her first meeting with the agents. (173)

With the jury present. Mobley identified Leonard Rizzo, Lawrence Iarossi and Renato Croce as Lennie, Big Lou and Rene, respectively. (194)

On cross-examination, Mobley testified about the various crimes for which she had been arrested and about the three state charges still pending against her which she said the Government would help her with. (200-206) She had been arrested 21 times. She

testified that she had been receiving $620.00 per month from the Government since 1975. (206) She was arrested in San Francisco for forgery while she was a co-operating witness. (212)

Mobley stated that she had been physically and mentally dependent on heroin and had lied in order to obtain drugs. (255) She had been addicted to heroin, cocaine, morphine and dilaudid. (310)

Mobley testified that she met Croce with Lennie at the airport in New York at the end of 1970 or the beginnning of 1971. (336) Thie is the only time she met him. The meeting lasted about ten minutes. (336) Mobley did not remember at which airport the meeting allegedly took place. (337) Mobley stated that the person she met had whiskers, did not wear glasses and appeared heavier than Croce did at the present time. (339)

Mobley could not recall or even approximate how many times she made drug pick-ups in New York. (339)

In 1974, Mobley had originally stated that Ralphie was with Lennie on that occasion at the end of 1970 or the beginning of 1971. At trial, she indicated that she had been previously mistaken. (344)

On re-direct examination, Mobley stated that she received $2072.00 from the Drug Enforcement Administration in addition to the $620.00 per month she received monthly.

ANTHONY MANFREDONIA testified about his criminal record and his drug dealing dating from 1966. (375-382) In 1966, he stated that he met Snider Blanchard who h described as one of his customers. He testified that he and Iarossi were partners and that they dealt with Vincent Papa and Jack Lolorrieri. (395) From 1967 until 1969, Blanchard, Alvin Clark, Mary Mobley and " a guy named

Socks" were his customers. (401)

Manfredonia testified about meeting Panebianco in 1968 or 1969. (410) Manfredonia stated that Panebianco was an alternate source of drugs when he could'nt get any from Papa in Queens. (415) Manfredonia stated that in his dealings with Clark, he and Iarossi would fly to Pittsburg to deliver heroin and return with $10,000. to $13,000. (419) Manfredonia stated that Simonetti and Virgil Alessi made deliveries to Clark in 1969. (423)

Manfredonia described his operation involving Papa, Alessi, Tony Passero and Frank D'Amato. (441)

In 1971, Manfredonia sold heroin to Mobley at Newark Airport on two occasions. (456) The transactions involved half kilos for which he received $10,000. (457)

On cross-examination, Manfedonia testified about his arrests for flim-flams in Rockland County in 1973, while on probation in New Jersey on similar charges. (508)

Manfedonia stated that he would do " almost anything" to stay out of jail. (513) Manfedonia lied to the United States Attorney about his employment in 1975 in the hope of getting a low bail. (513-514) Manfedonia used $4,000. given to him by the Government to get back jewelry he had previously hocked. The jewelry had originally been purchased with the proceeds from drug deals. (518)

The balance of his testimony is covered in the briefs of defendants, Iarossi, Panebianco and Leonard Rizzo. Manfredonia made no reference to Croce whatsover in his testimony.

THOMAS L. MURRAY testified regarding drug deals involving Joseph Barone and G.T. Watson and the defendant Patsy Anatala. (681,709)

His test ony is set forth in the brief of defendant Anatala.

CHARLES FRISINA, employed by the N.Y.C. Police Department, testified regarding surveillance of the Scotts Pub in Queens. (774) He testified about a seizure of 34 pounds of heroin. (792) The heroin was found in the apartment of Louis LeSerra in a closet. LeSerra was not a named defendant at the trial. (818-819)

The Court then instructed the jury that the Government's theory was that the Queens drugs was a stash maintained by the conspiracy. The Court advised the jury that no evidence had been elicited that any of the defendants were ever present at the stash. This evidence was taken subject to connection. (824)

FORTUNATO deLUCA, employed by the N.Y.C. Police Department, testified regarding the surveillance of Scotts Pub in Queens. He described the seizure operation at 46-01 39th Avenue. Apartment 106. (827-830)

WILLIAM O'ROURKE, employed by the N.Y.C. Police Department, testified that John D'Amato entered the building at 39th Avenue shortly before the seizure was made. (835)

THOMAS HOUSTON, employed by the N.Y.C. Police Department, testified that he observed Frank D'Amato, John D Amato and Virgil Alessi at Scott's Pub during his surveillance. (840-841)

RALPH NIEVES, employed by the N.Y.C. Police Department, testified that he was an undercover operative in a case involving a person named Collin Carroll, in the Northeast Bronx. (847) This occurred during November and December, 1972. Nieves purchased a $70.00 sample of heroin from Carroll on November 15, 1972. On November 27, Nieves bought one ounce for $1,500. (847) On December 12, 1972, an additional purchase of one ounce for $1,350. occurred. All these transactions occurred in the vicinity of the Partners Shell Service Station at 222nd Street and

Eastchester Road. (848)

A person named Nevado was the alleged source of supply for Mr. Carroll.

On January 17, 1973, Nieves went to the service station after having negotiated to purchase an eighth of a kilo for $4,500. Nieves paid $2,000, Carroll left the service station with Mr. Nevado and returned with the eighth of a kilogram. Nieves then paid the additional $2,500. (849)

On February 6, 1973, Nieves met Carroll at his house and they drove in separate cars to the service station. At the service station, Nieves observed a blue Toronado bearing plate number 3347-BC. In the office area of the station, Nieves observed the Appellant Croce in conversation with Mr. Nevado and another individual named Graziano Rizzo. (850) Nieves did not know Croce or Rizzo at the time. Nieves made an in-court identification of Croce. (850)

When they arrived at the service station Carroll exited his car, went to Nieves' car and asked him for $9,500. Nieves gave Carroll $2,000. Carroll went into the service station and returned.Carroll told Nieves that Nevado did not want to do business because the feds were around. During this time Mr. Croce and Mr. Rizzo left the station, entered their car and left the area. (851)

Nieves told Carroll that he wouldn't do business and asked for his $2,000. back. Carroll only had $1,000. since he had given Nevado $1,000. Nieves told Carroll to go back into the station and get the rest of the money. Carroll said he would try to get the quarter kilo. (851-852)

Carroll went to the station and upon his return stated that

Nevado would do business. Nevado and Carroll left the station and returned with a manila envelope containing a large glassine envelope with white powder. Nieves told Carroll that the balance of the money was in the trunk of his car. (852)
When Nieves went to his trunk, Mr. Carroll and Mr. Nevado were arrested and Nieves was placed under simulated arrest. (852)

On cross-examination, Nieves testified that he never purchased heroin from Mr. Croce nor did he give Croce any money. (860) Nives stated that Mr. Croce was not present at any of the November or December transactions. (861) Further that no marked or serialized money was recovered from or found on Mr. Croce. (864) Nieves did not receive any narcotics from Croce on February 6, 1973. Nieves admitted that other people had entered the office of the service station and that the station was open for normal business transactions. (866)

ARTHUR DRUCKER, employed by the N.Y.C. Police Department, testified that he was involved in the surveillance of Mr. Nevado's residence and the place of his employment which was the service station at 1135 East 222nd Street. (869)

On January 16, 1973, Drucker observed a blue and white Oldsmobile at Mr. Nevado's residence at 1013 East 222nd Street at 10:30 P.M. Mr. Graziano Rizzo and Mr. Croce got out of the car, walked to the trunk which was opened by Mr. Croce. Mr. Croce removed a manila envelope from the trunk and Rizzo and Croce went into Mr. Nevado's residence. (871) They left the residence ten minutes later. When Drucker attempted to follow them he lost them in surveillance.(871)

On January 31, 1973, Drucker observed Mr. Croce and Mr. Rizzo at Nevado's residence again. (872)

On February 6, 1973, Drucker observed the Oldsmobile at the

gas station. Drucker saw Croce and Rizzo leave and followed them to the New England Thruway Southbound and then discontinued surveillance. (873) Drucker returned to the service station.

At 8:10 P.M., Drucker effected the arrest of Mr. Nevado and then went to Mr. Nevado's residence to search the premises. At 9:00 P.M., Mr. Croce and Mr. Rizzo arrived at the premises in the company of other police officers. (874) Drucker asked them for identification and checked their money for serial numbers. The money did not coincide with any of the serizlized bills. (874) Croce and Rizzo told Drucker that they came there looking for girls. (874)

Agent Benson asked Mr. Croce and Mr. Rizzo if the agents could look in their car. Mr. Rizzo opened the trunk with his key and the agents found nothing in the trunk. The agents then asked Rizzo to open the car door which he did. Agent Benson found a manila envelope under the passenger seat which contained two plastic bags containing a white powder. (875) The powder was field tested and found positive for heroin. (876) Five persons were arrested on February 6, 1973, Richard Nevado, Collin Carroll, Richard Carroll, Graziano Rizzo and Renato Croce. (877)

On cross-examination, Drucker testified that he did not see Mr. Croce sell or pass heroin nor did Mr. Croce have any of the serialized money involved in any of the Collins-Nevado sales. (885-887) Drucker stated that the owner of the automobile driven by Mr. Graziano Rizzo was Charles Simmons. Drucker acknowledged that Croce was not the owner or the driver of the vehicle. (888)

Drucker stated that he observed at a distance of 70 to 75 feet a manila envelope about 5 inches in width and 7 inches in length in Mr. Croce's hand at 10:30 P.M. on January 16, 1973.

(889) Drucker was unable to see inside the envelope and he conceded that it could have contained almost anything. (890) The observat ions were purely visual without benefit of any photogrphic or electronic devices except binoculars. (891)

Drucker was unable to hear any conversation. Drucker did not arrest Mr. Croce at the time nor did he stop Mr. Croce or attempt to search him. (891-892) Drucker's surveillance of the premises lasted from 9:00 P.M. until 10:30 P.M. that evening. (893)

On February 6, 1973, at 9:00P.M., Mr. Croce did not have any drugs on his person nor did he possess any serialized money. (902-903) Mr. Croce was not, Drucker maintained, free to go; that Croce was in fact under arrest. (903-905) Croce did not have keys to the car. (906) No fingerprints were lifted from the envelope found in the car. (910)

On redirect, Drucker. stated that Mr. Rizzo and Mr. Croce had several hundred dollars with them when they were arrested. (911) On recross, Drucker could not remember how much money Croce had with him. (912)

ROBERT BENSON, employed by the DEA as a Special Agent, testified that just before 9:00P.M. on February 6, 1973, he observed a blue Oldsmobile. The driver looked at him and sped off. (914) Benson chased the car, lost it, and then double backed and saw the car double-parked in front of a grocery store. (915) Benson approached the car, arrested the driver and told him to get out of the car. (915) Another person was arrested in a public phone booth who was identified as Mr. Croce. (917) Benson made an in-court identification of the Appellant Croce. (917)

After Mr. Rizzo and Mr. Croce were placed under arrest they were brought over to Mr. Nevado's house. (921)

On cross-examination, Benson stated that he had no personal knowledge that Mr. Croce was involved in any sales involving Detective Nieves. (925) At the time the car was stopped only Graziano Rizzo was present in the car. (931) Mr. Croce was in a phone booth about 15 feet away. (931)

C. ROBERT ELLIS, employed by the Bell Telphone Company of Pennsylvania, testified regarding New York toll calls. (972-973)

EDWARD McDONNELL, employed as a chemist by the N.Y.C. Police Department, was qualified as an expert. (975) He testified regarding the analysis of drugs in a case involving the D'Amato brothers. (976) Some of the packages contained non-narcotic substances, some contained heroin and one package contained cocaine. (978) He testified regarding the melting point of heroin which is 230°F. (979)

On cross-examination, Mc Donnell stated that he was unfamiliar with the neutron activation test used to determine the source of a given substance. (992)

ANTHONY FONSECA, employed by the DEA as a chemist. was qualified as an expert. (998) He performed an analysis on substances received by agents from Mr. Carroll Collins. (998) The percentages of heroin in each sample was different. (1002)

On cross-examination, Fonseca expressed some familiarity with the neutron activation test but had never employed it. (1007)

ARTHUR CARTER, JR. , employed by the DEA as a Special Agent, testified regarding the Manfredonia investigation. (1018) He testified to transactions involving Joseph Barone and G.T. Watson at the New Kentucky Riding Stables in the Bronx in April, 1972. (1047-1048) Carter described his surveillance of Barone and Patsy Anatala. (1073)

Carter testified regarding his questioning of James Panebianco after that defendant's arrest. Panebianco denied any knowledge of Graziano Rizzo. (1076)

Carter's testimony is set forth in greater detail in the briefs of the defendants Panebianco and Iarossi.

MICHAEL AGNESE, employed by the DEA, testified regarding defendant Blanchard's ownership of a laundromat in Baltimore. (1150)

JOSEPH CONCHEIRO, employed by the New York Telephone Company, testified regarding the record of telephone calls and telephone numbers belonging to Panebianco. (1154)

Concheiro testified that a telephone number 547-1357 was issued to a party named "L. Croce" residing at 660 Nereid Avenue on March 19, 1972. (1167) Prior to that the subcriber's number had been 547-1260.(1168)

On cross-examination, Concheiro stated that there was no record of any toll calls made from the telephone number assigned to L. Croce. (1183)

WALTER JENKINS, employed as a Special Agent for the DEA, testified regarding the surveillance of Joseph Barone on March 25, 1972 at Stilwell Avenue in the Bronx and to subsequent surveillance of Barone in April of that year. (1198)

JOSEPH FALSETTI, previously employed by the BNDD, testified that in April, 1972 he was involved in an investigation with Agent Carter. (1204) The surveillance involved Joseph Barone and Fiore Rizzo. (1207)

GLADSTONE GRIFFITH, employed as a forensic chemist by the DEA, testified and was qualified as an expert. (1216) He testified regarding the analyses of various Government exhibits and their compositions. The percentages of narcotics in each exhibit varied

from each other. (1219-1221)

On cross-examination, Griffith stated that he did not perform fingerprint analysis of the exhibits, but that such an analysis was performed by another chemist. (1224) No fingerprints were found on the one package on which fingerprint analysis was requested. (1225)

FALSETTI was recalled to testify regarding the chain of custody of certain exhibits. (1232)

The Government rested its case.

The Appellant renewed his motion to suppress narcotics as having been illegally obtained as against him. (1281)

THE DEFENSE CASE

MARIANNE RIZZO testified on behalf of the defendant Leonard Rizzo. (1347) Her testimony is set forth in the brief on behalf of Leonard Rizzo. (1355)

LEONARD RIZZO testified in his own defense and his testimony is set forth in the brief submitted on his own behalf. Leonard Rizzo denied meeting Mobley in Pittsburg. (1387) He thought he had seen her once at a baseball game in New York.

Leonard Rizzo stated that Graziano Rizzo told him he owned a beauty shop. (1391) He stated that Graziano Rizzo's partner at the beauty parlor was Ray Croce (referring to the Appellant). (1392)

Leonard Rizzo rested his case. The Appellant Croce rested his case. (1416)

DANIEL BROOKS testified in his own behalf. He stated that he knew Barone and G.T. Watson. (1424) He denied any involvement in narcotic transactions. His testimony is set forth in his brief.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

The Appellant Croce moved to suppress the narcotics allegedly seized from the automobile driven by Graziano Rizzo on February 6, 1973 on the grounds that the seizure had been made in violation of his constitutional rights. The narcotics seized had been the subject of a previous hearing before the Honorable Allen M. Myers, Justice, New York County Supreme Court on April 16, 1973. Justice Meyers granted the defendant's motion to suppress evidence in state court on the grounds that the seizure and arrest was without probable cause and that the People had failed to establish a consensual search of the automobile.

The hearing minutes as well as the decision of Justice Meyers was submitted to the Trial Court in this case who declined to hold a hearing on the motion. The Trial Court denied the motion to suppress and permitted such evidence to be introduced against the Appellant Croce. At the conclusion of the Government's case, the Appellant Croce moved to suppress the evidence which motion was denied.

POINT I

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT THE APPELLANT OF THE CRIME OF CONSPIRACY

Prior to the submission of the case to the jury, counsel for the Appellant Croce moved for a verdict of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The motion was denied. This was error because a reasonable mind could not fairly conclude guilt beyond a reasonable doubt with respect to the charge of conspiracy or the substantive counts and the judgment of conviction should be reversed and the indictment dismissed. United States v. Fantuzzi, 463 F.2d 683 (2d Cir. 1972); United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969); United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

With respect to the conspiracy count, the principal witness, indeed the only witness, against the Appellant Croce was Mary Mobley. Mobley, by her own admission, was addicted to heroin, cocaine, dilaudid and other drugs and would lie to obtain such drugs. She engaged in forgery, bank robbery and narcotics trafficking from 1965 until 1974, and was still committing criminal acts while she had already become a co-operating witness for the Government.

Mobley's testimony with respect to her meetings with members of the alleged conspirators is at marked variance with that of the Government's other principal witness, Anthony Manfredonia. Mobley asserted that she met with Manfredonia on about twenty occasions. Manfredonia acknow-

ledged only two or three such meetings. Mobley testified that she met with the Appellant, Croce, who she asserted was introduced to her by Leonard Rizzo as "Rene", on only one occasion. She stated that she met Croce and Leonard Rizzo at one of the New York airports at the end of 1970 or the beginning of 1971. At the meeting Croce allegedly gave her a package. Previously in 1974, Mobley had stated that Manfredonia, who she knew as "Ralphie", had been the other person present with Leonard Rizzo at that meeting.

Mobley testified that she made trips to New York every two to three weeks to pick up narcotics from 1968 until August, 1971 which would entail about 60 to 90 such trips.

This Court held in the case of United States v. DeNoia, 451 F.2d 979 (2d Cir. 1971) that:

> "For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate federal narcotic laws, there must be independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy, or the single act must be one from which such knowledge may be inferred. United States v. Agueci, 310 F.2d 817, 826 (2Cir. 1962); United States v. Aviles, 274 F.2d 179, 189 (2 Cir. 1960)"

In DeNoia the Court found that the defendant's delivery of heroin ina single transaction did not support the inference of knowledge of a broader conspiracy. United States v. Stromberg, 268 F.2d 256,267 (2d Cir. 1959); United States v. Reina, 242 F.2d 302,306 (1957) In the instant case, the only evidence tending to connect the Appellant to the Manfredonia- Barone combination is Mobley's testimony relating to a supposed meeting at an unnamed airport on an unspecified day at least five years prior to her testimony.

The testimony relating to the Collins-Nevado transactions as well as the seizure of narcotics from Rizzo's automobile were never related to the Manfredonia conspiracy by even the remotest linkage. If the Government wishes to contend that proof of the Appellant's involvement with Nevado and Collins provides guilty knowledge on the part of the Appellant of the nature of the Manfredonia conspiracy, one wonders why the Government did not hesitate to introduce the Appellant's arrest record in order to establish his familiarity with narcotics. Perhaps realizing that such introduction would be totally inadmissible, the Government sought to introduce evidence suffering from a similar infirmity.

Stripped of the Nevado-Collins testimony, dealt with at length in succeeding points of this brief, the Government failed to establish that Croce was ever a member of the Iarossi conspiracy or the Manfredonia-Barone conspiracy. Participation in a solitary act, such as alleged in this case, is insufficient to mark the Appellant as a conspirator. United States v. Aviles, 274 F.2d 179, at 190 (2d Cir. 1960).

It is submitted that not only is the non-hearsay evidence insufficient as a matter of law to amke Croce a member of the alleged conspiracy by a fair preponderance of the credible evidence, but that, all the evidence, hearsay and non-hearsay, is legally insufficient to make Croce a member of any conspiracy involving Iarossi, Manfredonia and Barone by proof beyond a reasonable doubt.

POINT II

THE EVIDENCE ADDUCED AT TRIAL FAILED TO ESTABLISH A SINGLE CONSPIRACY. PROOF OF MULTIPLE CONSPIRACIES SOME OF WHICH WERE TOTALLY UNRELATED TO THE APPELLANT WAS PREJUDICIAL AND DENIED THE APPELLANT A FAIR TRIAL.

The Government failed to establish the existence of a single conspiracy beyond a reasonable doubt. At best the proof established a series of smaller conspiracies and as such the conspiracy count should not have gone to the jury. United States v. Miley, 513 F.2d 1191 (2d Cir. 1975).

In United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), the Circuit Court gave warning to the Government that henceforth the haphazard linking of multiple conspiracies to form one overall conspiracy with the consequence that large numbers of individuals are tried together would be strongly scrutinized by the Court. The remedy would be the dismantling of the "single conspiracy" into its component parts so that the individual defendants would be spared the prejudicial effects of "spillover" from the more culpable participants. Subsequently, in the case of United States v. Miley, supra, the Government was again warned against the unnecessary and prejudicial joinder of defendants solely for the purpose of trying large number of persons together in the guise that they were participants ina single conspiracy.

Finally, in the case of United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975) the Circuit Court, taking the bull by the horns, reversed and remanded the conviction of the defendants after making a specific finding that the proof

established the existence of a series of smaller conspiracies rather than the single conspiracy alleged by the Government. The Court there found that the only common factor linking the transactions in Bertolotti was the involvement of two participants, Rossi and Corraluzzo. The Court concluded that such a linkage failed to establish a sufficient nexus to any real organization, even a loose one. Kotteakos v. United States, 328 U.S. 750, 90 L.ed. 1557 (1940)

In the instant case, even the tenuous connection found by the Bertolotti court is absent. The Government theorized that the kingpin in the alleged conspiracy was Lawrence Iarossi working together with his partner Joseph Manfredonia. In 1970, Iarossi was imprisoned and ceased any connection with the alleged conspiracy. Manfredonia, in his own testimony, stated that he withdrew from the narcotics business from March, 1970 until October, 1970.

Upon his reentry into the business, Manfredonia allegedly took on a new partner, Joseph Barone. The Government offerred no evidence whatsoever that the Appellant Croce had any involvement with the Iarossi led conspiracy. Indeed, the only link suggested is the alleged solitary meeting with Mary Mobley which is uncorroborated by any other source.

The Government next tries to develop the Collins-Nevado episode attempting to establish a link with the Appellant Croce. The Government does not establish, or even try to establish, that the narcotics involved with Nevado-Collins derived from the same source involved in the Manfredonia conspiracy. The chemical analysis of the various exhibits establish that the percentage concentraion of narcotics is

different in each of the exhibits.

The Government placed heavy emphasis upon the seizure of 34 pounds of narcotics from the Queens apartment of Louis LeSerra. The evidence failed to establish that any of the alleged conspirators on trial had ever been present at the site of the stash. Under the circumstnaces, the possibilities of spill-over effects from testimony on these transactions are patent when the number of conspiracies, the number of defendants and the volume of evidence are weighed against the ability of the jury to give each defendant the individual consideration our system requires. United States v. Bertolotti, supra.

The introduction of testimony regarding James Panebianco as a supposed, alternate source of narcotics for the Manfredonia operation puts to lie the Government claim that the evidence established a single conspiracy. The testimony is devoid of any evidence that Panebianco participated in the ongoing conspiracy or was even aware of the alleged extent of the conspiracy. The solitary transaction in which Panebianco is involved with Manfredonia involved a quarter kilogram, which amount though not small was hardly indicative of a large and pervasive conspiracy.

Finally, the introduction of the heroin taken from the automobile driven by Graziano Rizzo was improper, since the Government failed to establish that the Appellant Croce was ever present in that vehicle at any time when the narcotics were present in the vehicle. The infirmity of the seizure of the narcotics, dealt with under another point heading of

this brief, merely emphasized the tenuous nature of the Government's case and its need to grasp at straws in a vain effort to establish involvement in the absense of any clear evidence.

Because of the inherent dangers of the "spillover" effect and the likely transference of guilt, the Appellant was denied a fair trial and the denial of a severance by the trial court constituted error requiring reversal of the conviction.

POINT III

THE COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A SEVERANCE PURSUANT TO RULES 8(b) and 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The Appellant moved, prior to trial, for a severance pursuant to Rule 8(b) of the Federal Rules of Criminal Procedure requiring the Government to elect the Count or Counts upon which it wished to proceed to trial. The motion was denied. The motion for severance was renewed during the course of the trial and again denied. This was error and the judgment of conviction should be reversed. United States v. Kelly, 349 F.2d 720 (2d Cir. 1965); Drew v. United States, 331 F.2d 85 (C.A.D.C. 1964); Kotteakos v. United States, 328 U.S. 750 (1946).

At the outset of this case, the Appellant moved for a severance arguing that there had been improper joinder as to the various defendants. In the instant case, one conspiracy was alleged naming 13 defendants and 12 unindicted co-conspirators. The indictment* consisted of twenty-three counts, including the general conspiracy count. The Appellant was named in the conspiracy count and in counts Twenty-two and Twenty-three involving substantive offenses.

In Kotteakos v. United States, supra, 328 U.S. at 767, the Supreme Court said:

> "The burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate."

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* The original indictment 75 Cr. 170 contained fourteen counts; the Appellant was named in the first, thirteenth and fourteenth counts of that indictment.

In the course of the testimony of the Government's principal witnesses, Mary Mobley and Joseph Manfredonia, the Government's theory of the case unfolded. The Government contended that Lawrence Iarossi and Joseph Manfredonia were partners and the originators of the alleged ongoing conspiracy. The testimony clearly discloses that Iarossi's participation in the conspiracy terminated in 1970, albeit involuntarily, and that Manfredonia withdrew completely from the narcotics trade from March, 1970 until October, 1970, of his own volition.

The Government argues, but does not prove, that the subsequent involvement of Manfredonia with his new partner, Joseph Parone, was merely a continuation of the original conspiracy. Such reasoning flies in the face of logic since a conspiracy, defined as a partnership, necessarily ceases where the partners terminate their alliance. The Government failed to establish that the alleged conspiracy maintained any ongoing activity during the period from March to October of 1970.

The only common feature between the prior conspiracy and the latter conspiracy extending from late 1970 until 1973 was that narcotic distribution was allegedly involved. Manfredonia's source of supply changed (Panebianco being mentioned for the first time) and Manfredonia stated that he engaged in flim-flams during this period of time.

The only link suggested by the Government between the Appellant Croce and the latter conspiracy is the solitary meeting with Mobley. It is noteworthy that back in 1974 Mobley stated that Manfredonia (known to her as "Ralphie") and not Croce (allegedly known to her as "Rene") had met her at the airport with Leonard Rizzo. The Collins-Nevado though possibly

suggesting some involvement by the Appellant with narcotics generally is in no way linked to the alleged Manfredonia-Iarossi-Barone conspiracy postulated by the Government.

This case is materially different and easily distinguishable from United States v. Sperling, 506 F.2d 1323(1974), where a single large conspiracy to distribute enormous quantities of cocaine and heroin was alleged and proved. In Sperling, it was established that the two principals, Pacelli and Sperling had interlocking networks for the sale and distribution of cocaine and heroin. Pacelli supplied cocaine for resale to Sperling's customers and Sperling, in turn, provided heroin for resale to Pacelli's customers.

Mr. Justice Jackson, in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 454 (1949) wrote:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

Clearly, the strength of the Government's case was substantially stronger against other defendants than against the Appellant Croce. Under the circumstances, the refusal of the Trial Court to order a severance either under Rule Eight or Fourteen of the Federal Rules of Criminal Procedure as to the Appellant, was so prejudicial as to require reversal of the judgment of conviction.

POINT IV

THE TRIAL COURT'S DENIAL OF THE APPELLANT'S MOTION PURSUANT TO RULES 12, 41(e) and (f) TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS DEPRIVED THE APPELLANT OF A FAIR TRIAL.

Prior to trial the Appellant moved to suppress evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure on the grounds that said property was seized in violation of the Appellant's Fourth Amendment rights under the Federal and State Constitutions. The Appellant sought a hearing of this issue in the event that the Court determined not to suppress on the basis of the motion alone.

Previously in 1973, the Appellant Croce and Graziano Rizzo had been prosecuted in New York State Supreme Court for possession of heroin allegedly recovered from an automobile in which the Appellant was a passenger. The Honorable Justice Allen M. Myers, in a nine page opinion, concluding that the evidence seized must be suppressed on several grounds. The grounds stated were that the Appellant had been arrested without probable cause, that the automobile had not been seized pursuant to Section 3353 of the Public Health Law (N.Y. State Law) or its Federal counterpart, 19 U.S.C. 1607-1609, and that the Government had failed to eastablish a consensual search of the vehicle.

The Trial Court, in this case, denied the Appellant a hearing and used the transcript of the state proceeding together with briefs submitted by both sides to arrive at its determination. The Trial Court denied the motion to suppress and permitted the evidence to be introduced at trial. The Appellant renewed his

motion during trial, which was again denied.

Although it is conceded that the principle of collateral estoppel does not bar the Government from using evidence previously obtained and suppressed in a state proceeding in which the Government was not a party to the proceeding (United States v. Biegel, 370 F.2d 751 (2d Cir. 1967) this is usually the case only where the issue of the validity of the search and seizure were not litigated in the state court. See Ferina v. United States, 340 F.2d 837-839-40 (8th Cir. 1965) In the instant case, notonly were the precise issues addressed and ruled upon in the state court, but the Government some two years after the event sought in the Federal proceeding to invoke authority for the search which its agent (Benson) had not invoked at the time of the arrest of the Appellant on the state charges.

At the time of the Appellant's arrest on February 6, 1973, Special Agent Benson related at the subsequent hearing in state court, the government agents were under instructions to arrest Croce if he arrived with a package that evening. No evidence was presented indicating that any such package arrived that evening. Nevertheless, the agents arrested Graziano Rizzo in the blue Toronado and the Appellant Croce while he was outside the vehicle at a public telephone booth. Also at the hearing, Special Agent Benson testified that he did not know whether the agents were going to confiscate the automobile.

Benson further testified that when the Appellant and Graziano Rizzo were brought by the officers to the Nevado residence they were already under arrest. Arriving at the residence, the Appellant and Rizzo were asked to take out their money and it

was compared with the serialized listing used in the Nevado-Collins deals. None of the money in the possession of the Appellant or that of Graziano Rizzo had come from those purchases.

At the Nevado residence, the Appellant and Rizzo were handed subpoenas to appear in the Grand Jury as witnesses. At the hearing Detective Drucker attempted to explain that the subpoenas were issued because of the statements (allegedly false) made by the Appellant and Rizzo at the time of their arrest by Benson. However, the fact that the subpoenas had been prepared prior to the Appellant's arrival puts that argument to lie. It is also noteworthy that despite the fact that Benson asserted that Croce and Rizzo had been advised that they were arrested in 1973 for violation of the Federal narcotic laws" that the Government declined to prosecute and no information or indictment was ever prepared.

If the Government's contention that the Appellant and Rizzo were not free to go, i.e. that they were under arrest, is accepted as true, then such arrest was illegal since it was not based upon probable cause. Henry v. United States, 361 U.S. 98. Everything that flowed from such an illegal arrest was therefore tainted and the subsequent search of the automobile was improper under the doctrine of the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471; Silverthrone Lumber Co. v. United States, 251 U.S. 385.

Although the eventsprior to the "arrest" of the Appellant and Graziano Rizzo may have provided a basis for suspicion such suspicion never matured to the level of "probable cause." Brinegar v. United States, 338 U.S. 160.

The Government's belated reliance* upon the provisions of 49 U.S.C. 781 et. Seq. is merely an afterthought and clearly not in accordance with the facts disclosed by the original hearing minutes in 1973. Section 782 provides, in material part, that:

> " Any ... vehicle ... which has been or is being used in violation of any provision of § 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited...."

Even assuming, for the sake of argument, that such section was applicable, the record is devoid of any indication that the Federal officers making the " arrest" and seizure did so in reliance upon such provision. Benson stated that Rizzo retained the keys to the car and was permitted to drive it back to the Nevado residence after his alleged arrest. A most unusual procedure to say the least! Furthermore, once Croce and Rizzo arrived at the house and their money was checked, the agents requested permission to inspect the vehicle's trunk and its inside cab. The Government's contention that such a request was merely an exercise in excessive caution is belied by the fact that the same agents thought nothing of "arresting" Rizzo with drawn guns only minutes before.

The State court justice found after conducting an extensive hearing that the Government had failed to establish by clear and convincing evidence that the Appellant and Rizzo had consented to the search. Johnson v. Zerbst, 304 U.S. 458; Bumper v. North Carolina, 391 U.S. 543; The court further found it incredible that an alleged narcotic trafficker, such as Rizzo was alleged to be, would voluntarily consent to a search which he

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* In 1973 Only Section 3353 of the Public Health Law and 19 U.S.C. 1607-1609 were even alluded to.

knew would disclose incriminating evidence. Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1950); United States v. Shropshire, 271 F. Supp. 521 (E.D.La. 1967)

Even if the Government is not foreclosed from attacking the state court determination on the grounds of " Collateral estoppel", the facts still remain that the Government has failed to justify any basis upon which to have seized the narcotics. Mental gymnastics performed some two years afterwards in a vain effort to determine some possible justification is mere hindsight. The operation of the agents' minds at the time the seizure and arrests were made, as evidenced by their testimony at the hearing conducted shortly after the events, should control. It is submitted that the evidence thus disclosed clearly indicates that the contraband was seized in violation of the Fourth amendment rights of the Appellant and should have been suppressed from evidence.

With such evidence excluded, the Appellant's conviction on the substantive offenses would have been rendered impossible. His conviction on the conspiracy count would be highly doubtful resting solely on the slenderest thread of Mobley's uncorroborated assertion of a solitary meeting. To permit the introduction of such tainted evidence would sanction the use of the " reverse silverplatter" doctrine (Linkletter v. Walker, 381 U.S. 618, at 631) and its attendant abuses.

POINT V

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURES, APPELLANT CROCE HEREBY ADOPTS THE POINTS AND ARGUMENTS OF THE OTHER APPELLANTS INSOFAR AS THEY MAY HAVE APPLICATION TO THE APPELLANT, CROCE.

CONCLUSION

For the above-stated reasons, the Judgment below should be reversed and the case remanded to the District Court with a direction that the indictment be dismissed as to the Appellant or, in the alternative, that the Appellant be granted a new trial.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

RENATO CROCE,
Appellant,
and
VIRGIL ALESSI ETAL.,
Defendants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 23 *day of* June *19*76 *at* One St. Andrews Plaza, New York, New York

deponent served the annexed Brief *upon*

Robert B. Fiske Jr.

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 23 *day of* June *19*76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA